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ABSTRACT

This document analyzes different approaches to the goal of equal educational opportunity and discusses the judicial role in achieving it. One approach argues that equal dollars or equal facilities and services must be provided to each pupil. Some people have contended that racially segregated schools deprive minority students of an equal educational opportunity. Others, supporting an outcomes approach, have taken the perspective that equal educational opportunity must be defined in terms of the effectiveness of the resources used and the processes of the educational system: i.e., each child should be developed to the minimum level sufficient for adequate functioning in a modern world. The document urges that as a matter of policy, an outcomes definition of equal educational opportunity is more sensible, but that it is impractical and inappropriate for judicial consideration and enforcement. For a constitutional decision on equal education to be effective, it must be simple, amenable to the application of court power, and acceptable to the public. (JF)

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Disparities in Educational Resources and Outcomes, and the Limits of the Law

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On Legal Problems of Education

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I. Introduction

It is typically American that the most significant modern attempt at racial equality, Brown v. Board of Education, involved the schools. Americans believe that education, when offered to everyone on an "equitable" basis, will permit the economically and culturally deprived to improve their lot and to take their fair share of society's status and income rewards. Fundamental political, social, and economic change are conceived of in educational terms; education--that is, schooling--will resolve conflicts, change attitudes, and diminish inequities. Professor Cremin stated the point succinctly when he noted that "in other countries, when there is a profound social problem there is an uprising; in the United States, we organize a course!" [1]

There is general agreement that equal educational opportunity is a goal worthy of achievement. There has been far less than a consensus as to how that concept should be defined and implemented. Many argue that equal educational opportunity means that each child must have equal access to schooling resources. Equal dollars or equal facilities and services must be provided to each pupil. Some have urged that racially segregated schools deprive minority students of an equal educational opportunity. Others have taken a broader perspective and argued that equal educational opportunity must be defined

in terms of the effectiveness of the resources and process. Thus, equal educational opportunity would mean that each child should fulfill his full potential, or develop to a minimum sufficient to function adequately in a modern world. In the words of John Gardner, the goal of education "is to enable every youngster to fulfill his potentialities, regardless of his race, creed, social standing or economic position."[2]

The first definition of equal educational opportunity relies on a basically moral and political argument: it is fundamentally unfair for the state to discriminate in the provision of educational services between children of different races and socio-economic groups -- regardless of the lack of empirical proof that the discrimination injures those children in terms of schooling outcomes or life prospects.[3] The state may not spend three times as much money on one child as on another -- merely because the latter is poor and lives in an inner city. Similarly, the state may not create segregated schools for black younsters. Apartheid is morally abhorrent, it is a badge of slavery and inferiority, it is an invidious classification, and it denies black children the equal protection of the laws.[4]

The third definition of equal educational opportunity, which looks to schooling outcomes, assumes that there may be wide disparities in the allocation of educational resources. These disparities may be acceptable if the differential

needs of children are being met such that there is an equality in the effects of the schooling process.[5] According to this view, resources are to be valued only as ways of achieving specified goals. Constitutional unfairness resides in the fact that educational failure -- poor achievement and lack of access to further schooling -- is not randomly distributed, but directly related to race and socio-economic deprivation.[6]

As a matter of policy, an outcomes definition of equal education opportunity is probably the more sensible. Our concern is not with shiny new buildings or books or fancy equipment; our concern is with the results those things achieve. We want poor and black children to perform well in school. Yet, as a lawyer, I must ask whether a concept of equal educational opportunity which focuses on schooling outcomes is appropriate for judicial consideration and enforcement. Reluctantly, I have reached the conclusion that it is not. My thesis is that the judiciary may appropriately intervene in the educational process to do two things: to redress discrimination, and to equalize the distribution of educational resources and services. Courts, however, should not adjudicate rights when cast in terms of schooling outcomes. This thesis derives both from considerations of the traditional role of courts in equal protection cases and from an examination of the social science literature dealing

with educational achievement.

II. The Judicial Role

There are clear constraints on the courts' ability to promote social reform. Apart from considerations of judicial craftsmanship, and the need for principaled decisions -- in Professor Wechsler's terms, "reasons that in their generality and their neutrality transcend an immediate result"[7] -- the courts are institutionally incapable of performing a full-fledged legislative role. Court decisions, historically, have been anti-majoritarian -- they have tended to protect minorities at the expense of the majority. Application of this understanding of the courts' role to education suggest that school policies may be overturned by the courts if those policies violate the fundamental constitutional rights of poor or minority children. However, courts will be reluctant to substitute their own wisdom for that of elected officials absent compelling reasons. Such compulsion is usually present only where the injured class -- in this case poor and black children and their parents -- are unrepresented or substantially under-represented in the political processes.[8]

Furthermore, courts cannot make factual determinations as readily as legislatures and administrative agencies. A legislature or school administration can hire a staff, hold extended hearings, commission a lengthy study and examine in detail every aspect of a complex problem -- giving all the conflicting

interests an opportunity to be heard. A court, on the other hand, is limited to the case before it, it does not have a huge staff, it does not have the expertise, and in general its processes are ill-suited to unravelling complicated facts for the purpose of setting broad policy. Furthermore, administrators and legislators, at least theoretically, are free to alter decisions as new information reveals their inappropriateness. Courts are not afforded this luxury. A constitutional decision, once reached, is not likely to be quickly overturned.[9] In light of this danger, the court in McInnis v. Shapiro, a suit concerning the allocation of educational resources, was unmistakably correct in holding that "...the courts simply cannot provide the empirical research and consultation necessary for intelligent educational planning."[10]

Under these circumstances, Professor Kurland has suggested that a fundamental decision based on the equal protection clause will be effective only if it meets at least two of three basic criteria[11] First, the constitutional standard must be simple. The complexities of the situation must not be so great that the Supreme Court is unable to formulate an intelligible rule which can be communicated to the parties and to the lower courts. Second, the courts must have the ability to enforce their decisions effectively. If a particular result is constitutionally required, the courts must be able to apply their power to something that is amenable to the application of power. They must be able to affect men, resources, and policies in a manner calculated to achieve their ends. Third, there must be "public acquiescence--there is no need for agreement, simply the absence of opposition --

in the principle and its application."[12]

Given this sense of the constraints on the judicial role, let me set out my contentions more specifically. I believe that it is inappropriate for the courts to intervene in the educational process so as to bring about some equity in the distribution of schooling outcomes because the issues are so complex and the state of our knowledge so backward, that the courts presently cannot create or enforce simple rules which will achieve that purpose.

The courts are a proper forum for the adjudication of the moral, political, and constitutional issues raised by inequities in resources and by racial discrimination. In these cases, the problem is one of counting or measuring what goes into the process. Furthermore, the courts are a proper forum for helping to create a non-coercive school environment, and for guaranteeing personal liberties to juveniles. Again, the concern is with how children are treated per se, and not with the effects of that treatment on educational achievement. In dealing with the empirical vagaries of outcome equalization, however, courts are fundamentally unsuited to bring about reform. Tidbits of social science research are not the stuff of which inflexible constitutional standards can be made.[13]

III. Equal Educational Opportunity and Outcome Equity.

Thus far, an outcome model of equal educational opportunity

remains ill-defined. Do we mean that each child, regardless of his background should reach the same level of achievement? Or do we mean that each child should be able to reach his full potential -- thereby preserving a large degree of disparity in the effects of schooling? How do we measure potential? Potential for what? Given limited resources, to what extent should we concentrate on raising the underachieving child up to the norm? Or should we focus on the so-called gifted child? How do we measure achievement? Are we concerned only with test scores? With inculcating a sense of personal self-worth and fulfillment? With life prospects as measured by status and income? Answering these questions is extraordinarily difficult. Unfortunately, in large part, they have not been asked by those concerned with equal educational opportunity. Rather, there has emerged what can be called the "liberal model" for educational reform. This model is the culmination of the efforts of liberal reformers to substitute the American democratic ideal and a faith in technocratic expertise for a clear understanding of this complex issue.

The liberal model views schooling as a process designed to sever what is deemed to be an illegitimate relationship between family background -- race and class -- and educational success.[14] The model assumes that the capacity to learn is randomly distributed between races and socio-economic groups. Thus, a properly functioning educational system is one in which failure and success are randomly distributed and cannot be correlated with race, social class, or wealth. In this

respect, it is improtant to note that an educational system which treated all students shabbily would satisfy the "liberal model." "The target evil" is the discrimination and not the deprivation of an essential right.

The possibility of such an ironic result to reform efforts has led Professor Michelman of the Harvard Law School to argue that the "'equality' explosion of recent times has largely been ignited by reawakened sensitivity, not to equality, but to a quite different sort of value...which might be called 'minimum welfare.'"[15] The liberal model then, seeks not so much to eliminate educational failure, as to eliminate discrimination in the distribution of such failure.

The liberal model further assumes that there is a single definition of educational success which we all accept. Test scores measure educational performance, high test scores allow access to additional years of schooling, and both are prerequisites to the good life -- that is, status and income. In the words of one commentator, "the value of education is seen as instrumental, leading to ends extrinsic from the processes of formal instruction itself. We get an education now so that at some later time we can earn money, vote intelligently, raise children, serve our country and the like."[16] Disregarding arguments as to whether commonly employed tests are culturally biased, and as to whether school performance is, in fact, a good

indicator of life performance,[17] the liberal model rejects a healthy pluralism of educational ends in favor of a single monolithic goal -- improved achievement as measured by tests. Education may have many purposes -- to instill a sense of community, to maximize individual liberty, to create self-respect, to inculcate a feeling of purpose and self-worth, and to begin a process of intellectual growth. The liberal model ignores these conflicting values.

The most significant premises of the liberal model, the premises ultimately affecting judicial intervention, are that our technology can identify what affects schooling outcomes, that there are experts who can and will perform this function, and that society has an unremitting obligation to heed the advice of these experts in defining Constitutional rights. That is, having decided that the properly working school system should eliminate differences in achievement arising from racial and socio-economic background factors, we assume that we know how to intervene in the schooling process so as to bring about that result.[18]

The fact is that we know very little about the relationship between particular resources and polices and educational outcomes, what economists call the education production function. Indeed, it is far from clear whether schools in any way reduce the effect of socio-economic factors on achievement. The Coleman Report noted that

> Whatever may be the combination of non-school factors -- poverty, community attitudes, low educational level of parents -- which put minority children at a disadvantage in verbal and nonverbal skills when they enter the first grade, the fact is the schools have not overcome it.[19]

The Report went on to find that after controlling for six student socio-economic background factors, differences in resources

and policies between schools accounted for less than 1% of the average pupil achievement differences. Further, Coleman discovered that within school variations in achievement were four times greater than between school variations.[20] These findings argue that family background has the most significant effect, that school policies and resources have a relatively slight impact, and that, despite our technological skills, children who attend the same school, have the same amounts of money spent on them, and who have similar family backgrounds achieve at fantastically different rates. All schools fail to educate many of their pupils, and this is as true in suburbia as it is in the inner city.

The only factor over which the school has some control and which shows a relatively consistent if not substantial relationship to achievement is the socio-economic composition of the student peer group. If a poor child comes from a background which is not supportive of education, and if he is placed in a school where his fellow students have strong educational backgrounds and aspirations, his school performance is likely to improve. In the application of this finding, it is not clear whether there is an independent effect of racial integration or whether "the academic benefits of racial integration...[are] a consequence of racial differentials in the distribution of social class."[21] Further, it is at least arguable that poor families which send their children to predominately white and middle class schools are themselves educationally conscious, and this

consciousness, rather than the attitudes of fellow students may be the reason for improved performance.[22]

Once one looks beyond the composition of the student body, there is an array of tangible resources and policies which do not seem to affect relative performance.

1. According to the Coleman Report and its progeny, "facilities and curriculums of schools account for relatively little variation in pupil achievement as this is measured by standardized tests."[23]

2. Coleman found that the quality of teachers, as measured by verbal skill, level of education, and level of parents' education, showed a positive relationship to achievement.[24] Christopher Jencks -- reanalyzing the same data -- reached contrary results, and, indeed, found that the proportion of tenured teachers negatively correlated with student success.[25]

3. Both Coleman and Jencks found no evidence that reductions in class size would improve the performance of disadvantaged children.[26]

4. Emlen Hall recently reviewed the literature on ability groupings, and reached the following conclusions:

> ...the rationale for institution of plans, like ability grouping, relies heavily on the proposition that students in track systems increase their capacity to learn (and their educational achievement) as a consequence of the differentiated programs to which they are assigned...the problem posed: Do children grouped homogeneously achieve better over a given limited period of

> time -- usually not more than two years -- than children who are grouped heterogeneously, all other things being equal. Answer: Usually not. Further, there is some evidence that while homogeneous grouping has no particular effect on children of high or middle ability, it measurably adds to the disadvantage of children of low ability.[27]

The evidence that I have just discussed is not without its critics. Bowles and Levin, for example, attacked the Coleman Report and its successors on methodological grounds. They concluded that "...both from the measure of variables and the statistical procedures used, the research design was overwhelmingly biased in a direction that would damper the importance of school characteristics."[28] They strongly urged that no policy conclusions can be drawn about the effectiveness of school resources until a more careful analysis of data had been performed.[29]

However, it is this very lack of conclusiveness with regard to what factors bear on educational success that makes inappropriate judicial intervention in the process in order to achieve the goals of the "liberal model." Whether recent empirical studies are right or wrong, it is clear that we are a long way from a complete understanding of the causes of variations in the quality of education.[30] There are simply no standards that the courts or any other institution could forumulate presently which would assure improvement in the schooling outcomes of the disadvantaged. Even assuming the creation of a standard, there is no way to enforce such a broad

equal protection decision because the courts, like educators, do not have any notion as to how to manipulate resources and policies so as to achieve an equity in schooling outcomes. In sum, the acceptance of the ideology of the liberal model, and the assumption that a cogent constitutional argument can be made, do not make out a case for an affimrative judicial response. As the court in McInnis v. Shapiro, concluded,

> Even if the Fourteenth Amendment required that expenditures be made only on the basis of pupils' educational needs, this controversy would be non-justifiable. While the complaint does not present a 'political question' in the traditional sense of the term, there are no 'discoverable and manageable standards' by which a court can determine when the Constitution is satisfied and when it is violated.[31]

IV. Equal Educational Opportunity and Race

Having attacked the notion that the judiciary is an appropriate institution for dealing with inequities in pupil achievement or outcome, let me now turn my attention to those areas of education where I think a judicial response is called for. These are two: racial discrimination and inequities in the distribution of resources.

Since Brown v. Board of Edcuation, it has been a basic tenet of Constitutional law that schools deliberately segregated by race deprive minority children of an equal

educational opportunity. As the Brown court declared "segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive[s] the children of the minority group of equal educational opportunities."[32]

It is readily apparent that the Brown decision can be interpreted in a variety of ways. As Professor Kirp stated the point, "Was the Court [in Brown] implying that segregation was unconstitutional not only because it was morally abhorrent but also because it adversely affected chances for educational success?"[33] We may further ask: Was the Court primarily concerned with the differential resources made available to black and white schools? Was it treating students as a resource which must be equalized under the separate but equal standard? Or was the Supreme Court's response designed to ameliorate white dominance in the governance of public schools by attempting to mesh inextricably the educational fortunes of black and white children? Certainly, the Delphic text of the Brown opinion lends some support to all of these views.

The Brown decision makes sense in terms of public policy and judicial enforcement only if it is treated as a case premised upon the political and moral injury done by segregation.[34] Fundamentally, Brown stands for the proposition that racism, or apartheid, is not an acceptable Constitutional basis for public policy. Judge Sobeloff eloquently stated this point in a recent opinion:[35]

> ...Certainly Brown had to do with the equalization of educational opportunity; but it stands for much more. Brown articulated the truth that Plessy chose to disregard: that relegation of blacks to separate facilities represents a declaration by the state that they are infereior and not to be associated with.

Indeed, the courts have invalidated racial classifications in many areas of public concern--ranging from public golf courses and parks to public beaches[36] -- where equal educational opportunity was not at issue.

Treating Brown as an equal educational opportunity decision is disastrous. Professor Cahn noted more than 15 years ago that the constitutional rights of blacks or of other Americans should not "rest on any such flimsy foundation" as the social science data in the Brown record.[37] Fundamental human rights should not be recognized only upon a showing of favorable scientific evidence. Nor should those rights be withdrawn as less favorable evidence comes to light. Policies of apartheid in our public schools should not be resurrected because of new developments in educational research. Souther- courts from Stell v. Savannah-Chatham County Board of Education[38] through the recent Fourth Circuit decisions in Swann v. Charlotte-Mecklenburg Board of Education[39] and Brewer v. School Board of the City of Norfolk[40] have given short shrift to arguments that the creation of a unitary public school system may be educationally harmful. While some experts have indicated that particular ratios of black and white students in each school may be educationally beneficial, these courts have rejected such formulas where they "defeat integration."[41]

Beyond the inherent problems in using social science data to define fundamental rights, it is clear that the courts, like educational researchers, have difficulty relating racial integration to schooling outcomes. As I indicated earlier, the evidence is too inconclusive to permit judicial intervention on this basis. We simply ~~do not know whether~~ have no assurance that racial integration will raise the

achievement of minority children. ~~to that of white children.~~

Thus, the courts need not determine what the optimal degree of integration is to promote educational achievement -- the task is only one of ensuring racial balance in the schools. Effects on achievement are incidental and irrelevant. The courts can -- with difficulty -- create standards and enforce them to achieve such balance, but fundamentally, the courts cannot relate integration to broader outcome goals. Under this view, all forms of segregation -- whether described as de facto or de jure -- must fall where they represent an implicit immorality, a badge of inferiority. It may also be the case that segregation by socio-economic class is unconstitutional under a similar analysis.[42] But for the reasons mentioned earlier, I reject the view -- most clearly and recently expounded in Keyes v. School District Number 1, Denver, Colorado[43] -- that a concept of equal educational opportunity which focuses on an equitable distribution of achievement can provide an adequate basis for judicial intervention in the desegregation area.

In the Keyes decision the court reviewed the testimony of James Coleman, an expert witness in the case, and summarized his views in the following passage:

> Dr. Coleman stated that a child's ability to learn is significantly affected by the educational stimulation provided by his family. Since Negro and Hispano children from low socio-economic families are typically not provided with this stimulation, a compensating stimulation must be provided by the peer group in the school. Where all children in the school come from families with similar low socio-economic status, the negative effect produced by family background is reinforced rather than alleviated. Dr. Coleman testified that although a racially isolated school is not inferior per se, it will inevitably provide an unequal educational opportunity where the racial or ethnic isolation involves a homogeneous student body all from uneducated and deprived backgrounds.[44]

On the basis of this and other expert testimony, the court held that "the only hope for raising the level of these students and for providing them the equal education which the Constitution guarantees is to bring them into contact with classroom associates who can contribute to the learning process; it is now clear that the quality and effectiveness of the education process is dependent on the presence within the classroom of knowledgeable fellow students."[45]

This rationale is inconsistent with the result that the court reached. The court ordered racial integration, and not socio-economic integration despite the clear meaning of the expert testimony. While it is true that a racial classification may greatly overlap with a socio-economic classification -- in other words that many minority children will also be poor -- under Keyes it is an acceptable alternative for the school system to submit

a plan which integrates the black students with the poor white students. Further, there was no determination -- nor could there be -- as to the optimal balance of races or classes for purposes of raising schooling outcomes. Thus, in my view, the Keyes decision rests on the principle that racial segregation is a denial of equality to blacks. The equal educational opportunity holding is largely an attempt to avoid confronting the judicial bastion of de facto segregation. To the extent that this is true, the Keyes decision, and hundreds of other desegregation cases, are an appropriate exercise of the judicial power.

V. Equal Educational Opportunity and Resources

Equal educational opportunity has been interpreted by many to mean that each student must have equal access to educational resources -- that is dollars, teachers, buildings, and equipment. The notion is not new to the law; for since Plessy v. Ferguson it has been established Constitutional doctrine that racially separate public facilities must be equal in terms of their tangible properties. This was also the basis for the more recent decision in the District of Columbia, Hobson v. Hansen. However, such scholars as John Coons have pressed for a more expansive doctrine, which would primarily benefit the poor.[46] In his view it is constitutionally impermissible for the state to discriminate among children on the basis of the wealth of the school

district in which they reside. Regardless of our inability to evaluate the effects of particular school resources on the achievement of disadvantaged children, Coons would argue it is fundamentally unfair for the state to distribute its education dollars on a discriminatory basis. If money really does not affect educational performance, then white and middle class communities should have little hesitancy in allowing for a more equitable distribution of the state's resources.

There are a number of difficulties with the resources concept of equal educational opportunity.[47] If resources are defined as those educational inputs that affect educational outcomes, we are back where we began -- we cannot identify those resources. Furthermore, there are many intangible but possibly important resources -- such as teacher attitudes, teacher and student expectations, and school prestige, which the courts cannot affect. Yet, more obvious disparities in objectively measured resources may be corrected. From the standpoint of the judicial role, a simple standard such as dollar equality, or equal ability to command educational resources would be relatively easy for the court to enforce through its injunctive powers. The court should not be in the business of measuring the effectiveness of resources, but rather it should seek to achieve an equitable dollar balance -- much as in the

desegregation area, the courts should seek a racial balance.

Obviously, resource equality could prevent school districts from meeting the differential needs of school children. It could undermine compensatory educational programs which provide the poor with supplemental services, and it could undermine the American educational tradition which places control over local schools in the hands of local school officials. Professor Coons has attempted to meet these arguments by urging that the state may discriminate in the allocation of its educational wealth where there is a compelling interest in doing so. Presumably, Coons would allow supplemental services for the disadvantaged, the handicapped, or the mentally retarded. Further, Coons advocates a district power equalization scheme under which each district would receive the same amount of money at each tax level -- regardless of the absolute number of dollars raised. Thus, each district could decide for itself the extent to which it values education and it could spend money for that purpose irrespective of the narrowness of its tax base. While these developments and refinements are crucial to the adoption of a judicial standard which makes political and educational sense, they do not affect my basic contention that resource equalization -- notwithstanding adverse holdings in the McInnis and Burrus decisions, is a task sufficiently manageable as to permit a judicial response.

As I have attempted to show, I am concerned about the feasibility or the desirability of judicial intervention in the educational process, where that intervention is designed to break the ties between race and class and school performance. However, the attitudes evidenced by those who advocate the liberal model have repercussions well beyond the issue of the propriety of judicial action. Rather, that model carries with it an unyielding faith that somehow educational expertise can perform miracles in resolving basic human difficulties. The model fails to recognize that education implies values which transcend technocratic expertise. More dollars, more buildings, more teachers do not necessarily mean better education. As Paul Goodman has preached again and again, there is a "brutal incompatibility of such a fanatically quantitative ethos with the qualitative life needs of the person." [48]

It is ironical, but the very absence of empirical evidence which should inhibit courts from interfering in the educational process, and which in a sense, frees the educator from legal accountability for schooling failures, may in the long run enable the judiciary to strike down many coercive educational practices. While the courts may not be very good at intervening affirmatively to equalize outcomes, historically, the courts have been able to play a negative role effectively. That is, courts may strike down coercive school policies which violate individual liberties, and which are premised on a woe fully inadequate and nebulous expertise. No longer will educators be able to silence students

under the guise of educational necessity, where the true reasons are inertia, tradition, or pedagogical or administrative convenience. Our present-day courts have placed far too great a reliance upon the judgment of educational experts. Vociferous discussion of current political issues in the classroom, where that discussion is not a part of the day's lesson plan may disturb some people, and may in some sense be deemed disorderly. But where is the body of empirical data supporting the proposition that such disorder impedes educational achievement? Indeed, educational philosophers such as Paul Goodman and Edgar Friedenberg would urge that spontaneous discussion is a prerequisite to real learning.

In conclusion, I would hope that we have entered a new era where the inadequacies of educational expertise have become apparent, where many are beginning to challenge the notion that fundamental educational policy decisions should be made by an elite on the basis of its perception of how to improve educational quality. The courts should also be guided by this new wisdom.

FOOTNOTES

[1]Cremin, The Genius of American Education 11 (1965).

[2]Wise, "The Constitution and Equal Educational Opportunity," in Daly (ed.), The Quality of Inequality: Urban and Suburban Public Schools 42 (1968).

[3]See Coons, Clune, and Sugarman, Private Wealth and Public Education (1970). Compare Cahn, "Jurisprudence," 30 N.Y.U. L. Rev. 150 (1955).

[4]United States v. Jefferson County Board of Education, 372 F. 2d 836 (5 Cir. 1966), aff'd en banc, 380 F. 2d 385 (5 Cir. 1967), cert. denied 389 U.S. 840 (1967); Brunson v. Board of Trustees of School District No. 1 of Clarendon County, South Carolina (4th Cir., No. 14, 571, June 5, 1970)(Sobeloff, concurring).

[5]Kirp, "The Poor, the Schools, and Equal Protection," 38 Harv. Ed. Rev. 635 (1968). See also Benson, The Economics of Public Education (1968).

[6]See Wise, supra; Comment, "Equality of Educational Opportunity: Are 'Compensatory Programs' Constitutionally Required?", 42 So. Cal. L. Rev. 146 (1969).

[7]Wechsler, "Toward Neutral Principles of Constitutional Law," 73 Harv. L. Rev. 1 (1959). See also Black, "The Lawfulness of the Segregation Decisions," 69 Yale L.J. 421 (1960).

[8]See Coons, supra.

[9]See Plessy v. Ferguson, 163 U.S. 537 (1898).

[10]McInnis v. Shapiro, 293 F. Supp. 327 (N.D. of Ill. 1968).

[11]Kurland, "Equal Educational Opportunity or The Limits of Constitutional Jurisprudence Undefined," in Daly (ed.), The Quality of Inequality: Urban and Suburban Public Schools 58 (1968).

[12]Ibid.

[13]Compare Cahn, "Jurisprudence," 30 N.Y.U. L. Rev. 150 (1955); Black, "The Lawfulness of the Segregation Decisions," 69 Yale L.J. 421 (1960).

[14]See Wise, supra.

[15]Michelman, "The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment," 83 Harv. L. Rev. 7 (1969).

[17] See, e.g., Gintis, Alienation and Power: Toward a Radical Welfare Economics, Ph D. dissertation (Harvard, 1969); Hanock, "An Economic Analysis of Earnings and Schooling, 2 Journal of Human Resources 310 (1967).

[18] See, e.g. McInnis v. Shapiro, supra.

[19] Equal Educational Opportunities Survey (Herein-after the "Coleman Report").

[20] Ibid.

[21] Cohen, Riley, and Pettigrew, Unpublished Manuscript, Harvard University (1970).

[22] Jencks, Unpublished Manuscript, Harvard Center for Educational Policy Research (1970).

[23] Coleman Report, supra; Jencks, supra.

[24] Coleman Report, supra.

[25] Jencks, Unpublished Manuscript, Harvard Center for Educational Policy Research (1970).

[26] Coleman Report, supra; Jencks, supra.

[27] Hall, " On The Road to Educational Failure: A Lawyer's Guide to Tracking" 5 Inequality in Education 2 (June, 1970)

[28] Bowles and Levin, "The Determinants of Scholastic Achievement - An Appraisal of Some Recent Evidence," 3 Journal of Human Resources 8 (1967). Compare Jencks, "A Reappraisal of the Most-Controversial Educational Document of Our Times," New York Times Magazine (Aug. 10, 1969).

[29] Ibid.

[30] Burkhead, Public School Finance: Economics and Politics 87.

[31] 293 F. Supp. 327 (N.D. Ill. 1968).

[32] 347 U.S. 483 (1954).

[33] Kirp, supra.

[34] See generally Fiss, "Racial Imbalance in the Public Schools: The Constitutional Concept," 78 Harv. L. Rev. 564 (1965).

[35] Brunson v. Bd. of Trustees of School District Number 1 of Clarendon County, South Carolina (4th Cir., No. 14,571, June 5, 1970). See also U.S. v. Jefferson County Board of Education, 372 F. 2d 836 (5 Cir. 1966), where Judge Wisdom stated that "the separate school system was an integral element in the Southern State's general program to restrict Negroes as a class from participation in the life of the community, the affairs of the state, and the mainstream of American life; Negroes must keep their place."

[36] See, e.g., New Orleans City Park Improvement Association v. Detiege, 358 U.S. 54 (1958); Holmes v. City of Atlanta, 350 U.S. 879 (1955); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955).

[37] Cahn, "Jurisprudence," 30 N.Y.U. L. Rev. 150, 157, 158, 168 (1955).

[38] 333 F. 2d 55 (5 Cir. 1964). See also Jackson Municipal Separate School District v. Evers, 357 F.2d 653 (5 Cir. 1966).

[39] ___F. 2d ___ (4 Cir. May 26, 1970).

[40] ___F. 2d ___ (4 Cir., No. 14544, June 22, 1970).

[41] Swann v. Charlotte - Mecklenburg Board of Education, ___F. 2d ___ (4 Cir., May 26, 1970).

[42] See Brunson, supra.

[43] ___F. Supp ___ (D. Colo., Civil Action No. C-1499, May 21, 1970). See also Barksdale v. Springfield School Committee, 237 F. Supp. 543 (1965), overruled 348 F. 2d 261 (5 Cir. 1965).

[44] Ibid.

[45] Ibid.

[46] Coons, supra.

[47] See generally Michelson, "Equal Protection and School Resources," 2 Inequality in Education 4 (December 5, 1969).

[48] Roszak, The Making of a Counter Culture (1968).